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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 674

R. H. OSBRINK, M. E. OSBRINK AND BERTON W. BEALS, AS TRUSTEE, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF R. H. OSBRINK MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 505–514) is reported at 218 F. 2d 341. The findings of fact, conclusions of law, and order of the Board (R. 75–84, 23–62) are reported at 104 NLRB 42. The Board's Supplemental Decision and Order (R. 100–105) is reported at 106 NLRB 16.

JURISDICTION

The decision of the court below was entered on December 20, 1954, and a petition for rehearing was denied without opinion on February 23, 1955. The decree (R. 515–518) was entered on March 9, 1955. The petition for a writ of certiorari was filed on March 25, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 19–21.

QUESTIONS PRESENTED

1. Section 10 (b) of the National Labor Relations Act precludes the issuance of a complaint based upon unfair labor practices occurring more than six months prior to the filing of the charges. The first question is whether the allegations in a complaint, issued more than six months after the events complained of, were sufficiently related to violations alleged in timely charges to satisfy Section 10 (b).

2. Whether substantial evidence on the record as a whole supports the Board's findings of un-

fair labor practices and warrants the remedial order predicated on those findings.[1]

STATEMENT

In January and March 1952, UAW–CIO, herein called the union, filed timely charges with the Board alleging that petitioners had violated Section 8 (a) (1) (right to self-organization) and (3) (protection against discharge for union activity) of the National Labor Relations Act and specifically naming employees LeFlore and Plummer, among others, as having been discriminatorily discharged (R. 3–9). Pursuant to estab-

[1] The second question here presented combines petitioners' Questions numbered 2 and 3 (Pet. 4), both of which turn ultimately on the substantiality of the evidence in support of the Board's findings. Petitioners' Question 4 is not presented. As petitioners' Argument shows (Pet. 28–29), that question deals only with the propriety of the Board's order setting aside an election. We show below, p. 4, n. 2, that this order was issued pursuant to a representation proceeding under Section 9 of the Act which was consolidated for administrative reasons with the unfair labor practice hearing herein. It is well settled, however, that representation proceedings are not subject to judicial review except under special circumstances not present here, and that such immunity is not impaired merely because the proceeding has been consolidated for hearing with an unfair labor practice proceeding which is reviewable. *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453, 455, 458–459; *General Drivers* v. *National Labor Relations Board*, 179 F. 2d 492 (C. A. 10); *Operating Engineers, AFL, Local No. 148* v. *Operating Engineers, AFL, Local No. 2*, 173 F. 2d 557 (C. A. 8).

lished procedure, the General Counsel for the Board investigated these charges and on July 25, 1952, issued a complaint specifying in detail the conduct constituting the violation of Section 8 (a) (1) and (3) of the Act which had been alleged in the charge (R. 15–18). The matter was noticed for hearing[2] and upon the evidence adduced therein, the Board made the following findings.

A. THE BOARD'S FINDINGS OF FACT[3]

1. UNLAWFUL INTERFERENCE DURING THE ELECTION CAMPAIGN

Following an organizational campaign, the union in December 1951 petitioned the Board to conduct an election to determine the bargaining representative for petitioners' employees (R. 26; 194, 257, 261, 280).[4] Pursuant to this petition

[2] Consolidated with this hearing was a hearing on the union's objections to petitioners' conduct with respect to an election held on January 25, 1952, pursuant to a representation proceeding under Section 9 of the Act to determine whether petitioners' employees desired the union as their bargaining representative. Inasmuch as the matters relied upon in the union's objections duplicated in large part the matters which were the basis of the unfair labor practice allegations, the representation hearing was consolidated with the unfair labor practice hearing for purposes of administrative convenience.

[3] In the record references which follow, page references before the semicolon refer to the findings in the intermediate report of the trial examiner (R. 23–60) which were adopted and approved by the Board (R. 76–77); page references following the semicolon refer to the record before the examiner.

[4] Petitioners are a copartnership operating a place of business in Los Angeles, California, where they manufacture aluminum and magnesium castings (R. 15, 19).

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such an election was scheduled for January 25, 1952.

On January 15, however, ten days prior to the election, petitioners discharged employee LeFlore, the most active union proponent in the plant, under circumstances discussed more fully below, pp. 6–8. A few days later Derry Smith, whom the Board found to be a supervisory employee (R. 34–36, 76), called his crew away from their work and told them that petitioner R. H. Osbrink had stated that the plant would be closed if the union won the election (R. 35; 224–225, 227–228, 243–244, 252, 265–266). Shortly thereafter, Smith warned Goynes, an employee working under his direction, that Osbrink would take away certain privileges then enjoyed by the employees if the union won the election (R. 36; 244). After LeFlore's discharge on January 15, Smith and Watkins, who was an assistant to the foundry superintendent (R. 459, 285), told employees that LeFlore had been discharged because of his union activity (R. 45–46; 240–241, 251). Smith also told Goynes that Goynes, too, had been slated for discharge because of his union activity and intimated that only his (Smith's) intervention had saved Goynes (R. 241, 251). Smith also stated in a conversation at LeFlore's home that LeFlore would never be rehired because he had been seen passing out union pamphlets (R. 46; 293–294).

On the afternoon of January 24, the day before the election, Osbrink himself assembled the em-

ployees during working hours and spoke to them concerning the election (R. 27–28; 141–158). After some prefatory remarks concerning the history of the plant and the opportunities for advancement open to the employees, Osbrink stated that his success had been achieved by open-shop methods and that he did not need or want the union (R. 29; 160, 143–144). Expressing the opinion that the union was interested in the employees only for the money it could get out of them, Osbrink capped his remarks by the statement, later reiterated, that if the employees would establish a fund for entertainment, picnics, and similar purposes, he would match that fund, dollar for dollar (R. 29; R. 144–146, 151–154, 157, 163). Chuck O'Day, a management representative, also addressed the employees on this occasion and stressed the disadvantages of union membership and the advantages of working for petitioners (R. 51; 146–151).

2. THE DISCRIMINATORY DISCHARGES

John LeFlore, Jr.: LeFlore, worked under the direction of Derry Smith (R. 39; 270–272).[5] Smith regarded him as a good worker and, during his employment under Smith's supervision,

[5] Derry Smith was in charge of the shake-out department which numbered between 20 and 30 employees who work in various locations throughout the foundry (R. 34; 273–275, 298–299).

assigned two new employees to LeFlore for breaking-in purposes (R. 43; 287–288, 409–410).

From the outset of his employment, LeFlore manifested his pro-union sympathies and when the union began its organizing campaign in the fall of 1951, he became its chief proponent in the plant, wore a union button, and openly solicited support for the union among his fellow employees (R. 44–45; 197, 240, 262, 276–283, 301–310, 316–319). On January 15, 1952, ten days before the scheduled election, LeFlore was suddenly discharged without explanation by Wally Watkins, the foundry superintendent's assistant (R. 45, 285–286). When LeFlore asked Watkins for an explanation, Watkins responded that he had merely acted on orders from the superintendent (*ibid*). The latter being unavailable, LeFlore sought out Osbrink who denied any knowledge of the discharge and referred LeFlore to the general manager, Beals (R. 46–47; 286). Beals likewise disclaimed knowledge of the incident but promised to inquire into the matter; two days later Beals informed LeFlore he had been discharged because "he got sand in the molds, because they could not keep track of him on his job, and because his work was unsatisfactory" (R. 47, 20; 486).

Meanwhile, on the day of the discharge, a member of LeFlore's crew asked Derry Smith why LeFlore had been discharged, and Smith replied that he did not know, that LeFlore was a good

worker, and that he would see Osbrink and try to get LeFlore back (R. 46; 260). On the following day, however, Smith stated that he would not try to get LeFlore back because LeFlore had been passing out union handbills outside the plant and that he would rather not ask Osbrink to rehire LeFlore, as Osbrink was opposed to the union (R. 46; 263–264). A few days later, Smith repeated to LeFlore at LeFlore's home that his efforts to have the latter rehired where in vain after it was known that LeFlore was handing out union handbills (R. 46; 264, 293–294). In like vein, the superintendent's assistant, Watkins, told LeFlore's coworker, Goynes, that LeFlore was discharged for talking about the union (R. 46, 246).

Archie Plummer: Plummer was hired by petitioners in June 1951 (R. 47; 311–312). Like LeFlore, Plummer was a strong union advocate and was active in the union's organizing campaign, openly discussing the advantages of union membership even in the presence of his superiors (R. 48; 313–314, 318–319, 322–323). Plummer also served as union observer in the Board election of January 25, a function noted by the superintendent who was present at the election to attend the counting of the ballots (R. 52; 360–362).

Because of a sprained back which put him under a doctor's care, Plummer was unable to work from late January to February 13, 1952 (R. 48; 321). About two weeks after his return to work,

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Plummer obtained permission from his leadman Walker to be absent for the day because of a heavy cold (R. 49; 319–320). When Plummer returned about noon the following day Watkins, the superintendent's assistant, asked for an explanation of his absence. Plummer promptly replied that he had obtained permission from Walker and asked Watkins, who had been standing within hearing distance on that occasion, whether Watkins had not overheard the conversation (R. 49; 320, 321, 340, 347). Despite this explanation, Watkins at the end of the day discharged Plummer stating as the reason for the termination that Plummer had been off the job without calling in to report his absence (R. 49; 327).

In the case of both LeFlore and Plummer, petitioners offered a variety of reasons which they said prompted the dismissals. Upon hearing the witnesses and analyzing the testimony, however, the Trial Examiner rejected petitioners' assertions as to the reason for the discharge.[6]

B. THE BOARD'S CONCLUSIONS AND ORDER

In its Decision and Order (R. 75–84) the Board preliminarily rejected, *inter alia,* petitioners' pro-

[6] Petitioners do not question the propriety of this determination in which both the Board and the court below concurred (Pet. 4, 21). Accordingly, we here omit any reference to that aspect of the case, noting only that the relevant evidence is fully discussed in the Trial Examiner's Intermediate Report at pages 40–43 and 51–54 of the Record.

cedural contention that the limitation provided in Section 10 (b) precluded the issuance of a complaint alleging specific violations of Section 8 (a) (1) of the Act which were not alleged in the charge and which antedated by more than six months the issuance of the complaint. On the merits the Board upon its review of the record accepted the conclusions of the Trial Examiner (R. 77), which included findings that petitioners had discharged LeFlore and Plummer because of their union activities, thereby violating Section 8 (a) (3) and (1) of the Act (R. 47, 55); that Osbrink's promise to the employees on the eve of the election of financial benefits as an alternative to paying union dues constituted unlawful interference within the meaning of Section 8 (a) (1) of the Act (R. 27–30); and that there was additional unlawful interference in statements and threats of Watkins and Smith to the effect that LeFlore had been discharged and would not be rehired because of his union activities, that employee Goynes would have been discharged for his union activities except for Smith's intervention, and that petitioners would close the plant or withdraw employee benefits if the union prevailed in the election (R. 35–36, 47).

Accordingly, the Board ordered petitioners to cease and desist from the specific unfair labor practices found and from in any other manner interfering with, restraining, or coercing their employees in the exercise of the rights guaran-

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teed by Section 7 (R. 80–81). Affirmatively, the Board's order required petitioners to reinstate LeFlore and Plummer with back pay, to furnish pertinent data for computing that back pay, and to post the customary notices (R. 81–82).

On July 7, 1953, the Board in a Supplemental Decision and Order denied petitioners' Motion for Reconsideration, Motion for Rehearing, and Motion to Dismiss (R. 100–105).

C. THE DECISION OF THE COURT BELOW

The court below, after a careful review of the entire record, affirmed the Board's ultimate findings and enforced the Board's order (R. 505–514). Rejecting petitioners' procedural contention that the Section 8 (a) (1) allegations of the complaint were barred because they were untimely and because they were not specifically alleged in the charge, the court below applied the accepted rule that permits inclusion in the complaint of matters which " 'relate back' or 'define more precisely' " charges timely enumerated in the original or amended charges (R. 512).

With respect to the discharges of LeFlore and Plummer, the court below concluded that the evidence in the record "taken into consideration with the circumstances as to [petitioners'] explanations of the discharges, justified the Board's finding that they were motivated by the employees' union activities" (R. 509). The court below agreed also that Osbrink's promise to the em-

ployees of financial benefits in lieu of their payment of union dues constituted unlawful interference (R. 510). Finally, the court below, while disagreeing with the Board's holding that Smith and Watkins were supervisors or anything more than trusted employees working in the capacity of leadmen, agreed nonetheless that the evidence in the record sustained the remaining allegations of unlawful interference (R. 508–509, 514).

Petitioners' motion for rehearing urging error on the court's disposition of the limitations issue, in the affirmance of the Board's finding of unfair labor practices predicated on the conduct of Smith and Watkins, and on the scope of the remedial order, was denied without opinion on February 23, 1955 (Pet. 8–9, 19, R. 519).

ARGUMENT

1. The ruling of the court below (R. 512) that the six months' limitation in Section 10 (b) of the Act does not preclude inclusion in a complaint of allegations which relate back or define more precisely charges enumerated in the original and timely charge accords with an almost unbroken line of authority in this Court and in the courts of appeals, and presents no question warranting review.[7] Indeed, petitioners concede

[7] See *Radio Officers* v. *National Labor Relations Board*, 347 U. S. 17, 34, n. 30, and the cases cited in the opinion of the court below (R. 512–513) and in the Petition (Pet. 12–14). An early decision handed down by the Court of

(Pet. 13) that the court below correctly stated the controlling law. Petitioners quarrel only with the court's application of that law to the instant case (Pet. 13, 14).[8] But this presents merely a question as to whether on the record before it the court correctly found that the violations alleged in the complaint and established in the record "relate[d] back to the charges timely filed" and whether "the company was thus given adequate notice and was not prejudiced by the amendment." *Radio Officers,* 347 U. S. 17, 34, n. 30.

This Court does not normally review questions of this kind which are essentially factual in

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Appeals for the Fourth Circuit, *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749, 754, not cited or relied upon by petitioners, seems to express a contrary view, but the view thus expressed was, as the opinion there stated, only an alternative ground for the decision and hence presents no real conflict. Moreover, as the court below noted in *National Labor Relations Board* v. *Martin*, 207 F. 2d 655, 657, certiorari denied on this point, 347 U. S. 917, the dictum in *Joanna* has not been followed in other circuits and, we submit, was laid to rest by this Court's ruling in *Radio Officers*.

[8] Petitioners contend, erroneously we submit, that except for Osbrink's promise of financial benefits to the employees, the Section 8 (a) (1) violations found by the Board and the court below fall for lack of evidentiary support (Pet. 10). See *infra*, pp. 16–17. Accordingly, petitioners raise the limitations issue only with respect to Osbrink's promise. Inasmuch as their contention, if valid, would apply equally to the remaining Section 8 (a) (1) violations, our discussion here comprehends all of the findings in this regard.

nature. Nothing in the record of this case warrants departure from this practice. Concededly, the charges filed in this case alleged a violation of Section 8 (a) (1) and (3) of the Act and specifically named LeFlore and Plummer as having been discriminatorily discharged because of their activities in behalf of the union (R. 4, 6–7, 9). The facts relevant to these discharges arose out of petitioners' hostility to the organizational campaign of the union and its consequent hostility to the union's leading adherents, particularly in the context of the forthcoming election. The several statements upon which the Section 8 (a) (1) violations were predicated bore directly, as the Board and the court below found (R. 103–104, 514), on the discriminatory discharges and these in turn occurred in the context of election misconduct which pursuant to consolidation was being litigated in the same proceeding as the discharges. Under these circumstances, the "relation back" rule is plainly applicable and review is not warranted.[9]

[9] Petitioners' contention (Pet. 14) that the court below is adopting a rule which in effect permits the addition of *unrelated* unfair labor practice allegations so long as the alleged practices occurred within six months of the filing of a charge alleging *any* unfair labor practice is wholly without merit as the language of the opinion plainly manifests (R. 510–514). The Board, also, has publicly declared that it no longer adheres to such doctrine. *Knickerbocker Mfg. Co.*, 109 NLRB No. 169, 34 LRRM 1551, decided September 9, 1954.

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2. Petitioners challenge (Pet. 20–27) the validity of the finding made by the Board and approved by the court below that employees LeFlore and Plummer were discriminatorily discharged in violation of Section 8 (a) (3) and (1) of the Act. This contention is based on petitioners' claim that there is a total lack of affirmative evidence to support this finding. Apart from the fact that the issue here raised is really one of the substantiality of evidence—a matter which this Court repeatedly declines to review—the claim is in any event refuted by the record. As the Statement shows, pp. 6–9, the record affirmatively establishes that LeFlore and Plummer were outstanding union adherents and openly solicited union support in the plant. It also affirmatively establishes that petitioners, who were avowedly hostile to the unionization of their employees, were aware of the activities of LeFlore and Plummer and of their pronounced union sympathies. When LeFlore was subsequently discharged with no explanation whatever at the time of his discharge and when Plummer was subsequently discharged for an obviously trumped-up reason, the Board and the court below could properly infer, as they did, that the true reason for the discharges was their union activity. *Radio Officers* v. *National Labor Relations Board,* 347 U. S. 17, 48–49. In this frame of reference the finding of discrimination is not vitiated but augmented, as

petitioners concede (Pet. 21), by the fact that the proffered explanations for the discharges do not stand up under scrutiny. *National Labor Relations Board* v. *Bird Machine Company,* 161 F. 2d 589, 592 (C. A. 1).

3. Petitioners' contention (Pet. 16–19) relating to the Section 8 (a) (1) violations which were predicated on the statements and threats of Smith and Watkins turns also on substantiality of evidence. In essence, petitioners assert that because the court below rejected the Board's finding that Smith and Watkins were supervisors, no unfair labor practice findings can be premised on their conduct. Petitioners, however, overlook the well-settled rule that an employer may be answerable for the action of his subordinates, notwithstanding their lack of supervisory status, so long as the employees have just cause to believe that they were acting or speaking for management. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 80; *National Labor Relations Board* v. *Engineering and Research Corp.,* 145 F. 2d 271, 272 (C. A. 4), certiorari denied, 323 U. S. 801; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.,* 133 F. 2d 295, 301 (C. A. 6). In the instant case the court below found (R. 508–509) that, while neither Smith nor Watkins possessed supervisory powers, Watkins, the superintendent's assistant or "leg man," was a trusted employee and a leadman, and that Smith likewise

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was a trusted, experienced employee and a leadman. In view of this status and in the overall context of petitioners' hostility to the union as evinced by the discriminatory discharges and Osbrink's anti-union speech just prior to the election, the employees could reasonably believe that Smith and Watkins were speaking for management. On settled authority, therefore, petitioners became answerable for that conduct. See cases cited, *supra*. Accordingly, the court below appropriately concluded (R. 514) that the violations of Section 8 (a) (1) alleged in the complaint were proved and enforced paragraph 1 (b) of the Board's order.[10]

Under these circumstances, the propriety of including in the remedial order a broad provision enjoining petitioners from in any manner interfering with the Section 7 right to self-organization is well established. Indeed, even absent the challenged findings, the discriminatory discharges of two union adherents and Osbrink's promise to the employees of financial benefits to discourage their unionization would of themselves warrant a broad cease-and-desist provision. *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120

[10] This holding refutes the suggestion implicit in the Petition (Pet. 16) that the court below rejected the Section 8 (a) (1) violations but inadvertently enforced the order based thereon. This refutation is confirmed by the fact that the court below denied a petition for rehearing which adduced the identical contentions here advanced (Pet. 19).

F. 2d 532, 536 (C. A. 4); *National Labor Relations Board* v. *Bailey Co.*, 180 F. 2d 278 (C. A. 6); *National Labor Relations Board* v. *Austin Co.*, 165 F. 2d 592, 596 (C. A. 7).

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question calling for review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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APRIL 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

Prevention of Unfair Labor Practices

Sec. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in

any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for

the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

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